

1 On August 23, 2013, Companion served separate offers of
2 judgment on the Sky High defendants, each in the amount of two
3 million dollars. Sky High rejected the offers. Over the course of
4 the next year, plaintiff dismissed or entered into settlements with
5 all but the Sky High defendants.¹

6 Trial commenced on September 14, 2015. The jury found in
7 favor of Companion and against Sky High on Companion's claim and
8 Sky High's counterclaims. With respect to Companion's negligent
9 misrepresentation claim, the jury found Companion forty percent
10 comparatively negligent. The jury's award of \$8,000,000.00 was
11 therefore reduced to \$4,800,000.00. After deducting offsets for
12 the settlements Companion reached with other defendants prior to
13 trial, the total judgment entered against Sky High amounted to
14 \$3,485,000.00.

15 **I. Attorney's Fees**

16 Companion seeks an award of attorney's fees totaling
17 \$222,668.50 based on Sky High's rejection of its offers of
18 judgments.²

19 Federal Rule of Civil Procedure 54(d)(2) sets forth the
20

21 ¹ On or around June 28, 2013, plaintiff settled with Highpoint for
22 \$250,000.00. On September 12, 2013, the court approved the settlement as
23 having been entered in good faith. On or around August 26, 2013, plaintiff
24 settled with defendant Pinnacle Underwriters for \$55,000.00. On October 22,
25 2013, the court approved the settlement as having been entered in good
26 faith. On or around April 17, 2014, Companion settled with defendant Karen
Faust and Consolidated Agency Partners ("CAP") for \$1 million. On July 1,
2014, the court approved the settlement as having been entered in good
faith. Plaintiff also settled with defendants Gloria Lam, Joan Vascones,
and Risk Placement Services for \$10,000.00. Plaintiff voluntarily dismissed
Weddell in April 2015.

27 ² Although Companion initially sought \$235,720.50, it concedes that
28 \$13,052 should be deducted for fees related to Pinnacle Underwriters, High
Point Risk Services, and Risk Placement Services. (See Opp 9-10; Reply 9).

1 procedure for obtaining an award of attorney's fees in federal
2 court. It does not, however, provide the substantive basis for
3 such an award. Fees are recoverable only if there is a rule,
4 statute, or contract that authorizes such an award. See *MRO*
5 *Commc'ns, Inc. v. Am. Tel & Tel. Co.*, 197 F.3d 1276, 1281 (9th Cir.
6 1999). A motion under Rule 54(d)(2) must identify the basis for
7 the requested award. Here, Companion identifies Nevada Revised
8 Statutes § 17.115.³

9 Section 17.115 provides that "any party may serve upon one or
10 more other parties a written offer to allow judgment to be taken in
11 accordance with the terms and conditions of the offer of judgment"
12 at any time more than ten days before trial. Nev. Rev. Stat. §
13 17.115(1). If a party rejects an offer and fails to obtain a more
14 favorable judgment, the court may order that party to pay the
15 offeror's "[r]easonable attorney's fees . . . for the period from
16 the date of service of the offer to the date of entry of the
17 judgment." *Id.* § 17.115(4)(d)(3).

18 Where, as here, the "court is exercising its subject matter
19 jurisdiction over a state law claim," a party may recover
20 attorney's fees under state law giving a right thereto if the law
21 "reflects a substantial policy of the state" and "does not run
22 counter to a valid federal statute or rule of court." See *MRO*
23 *Commc'ns*, 197 F.3d at 1281 (quoting *Alyeska Pipeline Serv. Co. v.*
24 *Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975)).

25 The controlling case applicable to the facts of this case is
26

27 ³ Although § 17.115 was repealed effective October 1, 2015, it was the
28 law at the time Companion made its offer of judgment. It is therefore
proper for the court to award attorney's fees pursuant to § 17.115.

1 *MRO Communications*. In that case, the Ninth Circuit held that
2 under Federal Rule of Civil Procedure 54(d)(2), a prevailing party
3 could recover attorney's fees incurred after a rejected offer of
4 judgment made pursuant to Nevada state law. *Id.* Here, Companion
5 made its offers of judgment pursuant to Nev. Rev. Stat. § 17.115.
6 Companion made its offers of judgment more than ten days before
7 trial. Sky High rejected the offers but failed to obtain a more
8 favorable judgment.⁴ Accordingly, under *MRO Communications* and §
9 17.115, Companion may recover reasonable attorney's fees, subject
10 to the court's considerations of the factors set forth in *Beattie*
11 *v. Thomas*, 668 P.2d 268, 274 (Nev. 1983).

12 The court has the discretion to allow any or all of the
13 offeror's attorney's fees incurred after service of the offer. *Id.*

14 In fashioning an award, the court must consider four factors: (1)
15 whether the defendant's claims and defenses were litigated in good
16 faith; (2) whether the offer of judgment was reasonable and in good
17 faith in both its timing and amount; (3) whether the defendant's
18 decision to reject the offer and proceed to trial was grossly
19 unreasonable or in bad faith; and (4) whether the fees sought by
20 plaintiff are reasonable and justified in amount. *Id.*; *RTTC*
21 *Commc'ns, LLC v. Saratoga Flier, Inc.*, 110 P.3d 24, 28 (Nev. 2005);
22 *Yamaha Motor Co. v. Arnoult*, 955 P.2d 661 (Nev. 1998). An award of
23 fees may be proper even where the defendant's claims and defenses
24 were litigated in good faith and the defendant did not act
25 unreasonably in rejecting the offer of judgment. See *RTTC*, 110

27 ⁴ Each Sky High defendant is jointly and severally liable for three
28 million four hundred and eighty-five thousand dollars under the judgment,
which is more than two million dollars.

1 P.3d at 29-30.

2 1. Sky High's Claims and Defenses

3 Sky High's defense of comparative negligence was litigated in
4 good faith. Sky High had a viable argument that Companion was at
5 fault due to its underwriting practices. Sky High's counterclaims
6 were also litigated in good faith. Its claims were based on
7 Companion's initial refusal to pay under the policy. While
8 Companion may have had a good faith basis for initially refusing to
9 pay, and although the jury did not find in Sky High's favor on its
10 counterclaims, there was nevertheless a basis for the claims.

11 2. Offer Timing and Amount

12 This action was litigated for nearly three years. Companion
13 made its offers less than a year after suit was filed, which was
14 early enough to avoid substantial litigation expenses but late
15 enough that the parties had some discovery with which to evaluate
16 the claims, defenses, and total damages at issue. As such, the
17 offers were reasonable in timing. The offers were also reasonable
18 in amount, as two million dollars was less than a quarter of
19 Companion's overall damages; the four million dollars that the Sky
20 High defendants would collectively owe was less than half.

21 3. Sky High's Decision to Reject

22 Sky High argues that it rejected the offers reasonably and in
23 good faith because at the time its case was much stronger than the
24 case that went to trial. When Sky High rejected the offers,
25 Weddell was still alive. Weddell passed away shortly before trial
26 and his testimony was ultimately provided through his videotaped
27 deposition. Sky High argues that, based on the results of mock
28 trials, Weddell's testimony would have been more compelling had it

1 been given in person. In addition, at the time of the offer, Faust
2 and CAP - whom the jury could have found partially responsible for
3 the misrepresentations - were still very much in the litigation and
4 at trial would have been part of the comparative negligence
5 analysis. Finally, Sky High believed that it had a strong case
6 based on Companion's underwriting failings.

7 The court concludes that Sky High was not unreasonable in
8 rejecting the offers. Although the offers were for much less than
9 the damages Companion was facing, the sum of the offers -
10 separately and collectively - were substantial. In light of the
11 amount of the offers and Sky High's belief that it had a strong
12 case, the decision to go to trial was not unreasonable.

13 4. The Fees

14 The first step in determining an attorney's fee award is to
15 calculate the "lodestar." *Candle v. Bristow Optical Co., Inc.*, 224
16 F.3d 1014, 1028 (9th Cir. 2000). The lodestar is reached by
17 multiplying the number of hours the prevailing party reasonably
18 expended on the litigation by a reasonable hourly rate. *Id.* In
19 most cases, the lodestar is presumptively a reasonable fee award.
20 *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 n.4 (9th Cir.
21 2001). However, if the circumstances warrant, the court may
22 "adjust the lodestar to account for other factors that are not
23 subsumed within it." *Id.* Those factors are:

24 (1) the time and labor required; (2) the novelty and
25 difficulty of the questions involved; (3) the skill
26 requisite to perform the legal service properly; (4) the
27 preclusion of other employment by the attorney due to
28 acceptance of the case; (5) the customary fee; (6)
whether the fee is fixed or contingent; (7) time
limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained; (9)
the experience, reputation, and ability of the

1 attorneys; (10) the "undesirability" of the case; (11)
2 the nature and length of the professional relationship
3 with the client; and (12) awards in similar cases.
4 *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1158 (9th Cir. 2002)
5 (citing *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th
6 Cir. 1975)). The court need not consider all factors - "only those
7 called into question by the case at hand and necessary to support
8 the reasonableness of the fee award." *Id.* In determining the
9 hours to be included in the lodestar, the court should exclude
10 hours that are "excessive, redundant, or otherwise unnecessary."
11 *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009).

12 In this case, Companion seeks \$235 per hour for partners Gina
13 Mushmeche and Martin Kravitz, and \$200 per hour for associates
14 Jordan Schnitzer, Chasen Cohen, Amy Rose, and Wade Van Sickle. The
15 court concludes these are reasonable hourly rates well within the
16 range of customary hourly charges in this locality.

17 Companion asserts that after it made the offers of judgment, a
18 total of 1,057.70 hours were spent on this litigation as follows:
19 (1) 508.9 hours at \$235 for Gina Mushmeche; (2) 302 hours and \$200
20 for Jordan Schnitzer; (3) 185.4 hours at \$235 for Martin Kravitz;
21 (4) 24.6 hours at \$200 an hour for Chasen Cohen; (5) 26.6 hours at
22 \$200 for Amy Rose; and (6) 10.2 hours at \$200 for Wade Van Sickle.
23 Sky High raises objections to some of these hours.⁵

24 1. Fees related to Faust and CAP: \$26,607.50

25 Sky High argues that fees related to Faust and CAP, including
26 settlement negotiations, should not be charged to Sky High.

27 ⁵ Sky High argues that Companion failed to comply with Local Rule 54-
28 16. However, the motion contains an affidavit from Gina Mushmeche attesting
that the fees were normal and customary for the work performed, and the
motion and reply substantially address the various factors set forth in the
local rule.

1 Companion argues that Sky High joined in many of Faust's motions
2 and ultimately relied on their expert so these fees are properly
3 charged to Sky High. Neither party identifies the specific line
4 items that are objectionable in this regard. However, plaintiff
5 does not dispute that \$26,607.50 in fees relate only to Faust
6 motions, experts, and settlement negotiations.

7 There was clearly an overlap between Faust and Sky High with
8 respect to the work Companion performed. However, it was not a
9 complete overlap. Faust was a major defendant in this case, and
10 the interests of Faust were not identical to the interests of Sky
11 High. A portion of the fees incurred by Companion were to address
12 the issues related solely to Faust and CAP, including settlement.
13 Accordingly, a twenty-five percent reduction of the fees relating
14 to Faust - \$6,651.87 - is appropriate to account for the fact that
15 some of the fees had no bearing on the case against Sky High.

16 2. Fees already denied: \$8,520.00

17 Companion previously sought an award of \$10,808.00 in
18 attorney's fees for certain work counsel performed in the two weeks
19 leading up to the original May 2015 trial date. The trial was
20 continued to September 2015 due to a legitimate medical
21 complication experienced by Sky High's primary witness, Rolland
22 Weddell. The court indicated at the time of continuance that it
23 would in all probability grant reasonable costs related to attorney
24 and witness travel to Reno for the trial initially scheduled. The
25 court did not authorize the payment of attorney's fees and noted
26 that it was not inclined to grant attorney's fees.

27 Companion then filed a motion for attorney's fees and costs
28 associated with the continuance. The court granted most of the

1 costs sought, although it denied costs for the attorney's meals and
2 travel expenses related to preparing Jerry Sam for trial. The
3 court also denied Companion's request for attorney's fees.

4 Sky High asserts that Companion's instant motion seeks these
5 "fees already denied" and that those fees total \$8,520. The basis
6 for this number is unclear, as Companion initially sought \$10,808
7 and all but one of the line items comprising this number are also
8 included in the bill submitted to the court.⁶ According to the
9 court's calculations, the total fees sought in the instant motion
10 that were also sought in the prior motion for attorney's fees
11 amount to \$10,737.50. Neither party has provided a detailed
12 analysis of the fees objected to in this respect.

13 As before, the court is not persuaded that the attorneys on
14 either side were required to perform additional work of substance
15 because of the continuance. The court's initial denial of these
16 requested fees is substantially reconfirmed. The court does,
17 however, recognize that there may have been some minimal additional
18 time spent by the attorneys serving subpoenas and discussing the
19 trial continuance with its client and witnesses. The court
20 concludes that \$2,000.00 is sufficient to compensate plaintiff's
21 attorneys for fees directly related to additional work expended as
22 a result of the continuance.

23 3. Miscellaneous: \$24,933.00

24 These fees concern communications about which the subject
25 matter was redacted. Sky High argues that Companion cannot show
26 the communications concerned Sky High so those fees should be

27
28 ⁶ The only omitted line item is \$70.50 charge on May 15, 2015, for
"emails with attorney Sluga re: expected date for trial appearance."

1 denied. Companion argues that it had a duty to communicate with
2 its client and all fees were necessarily incurred.

3 Because the subject matter of the communications has been
4 redacted, the court cannot find that these fees were reasonable and
5 justified. These miscellaneous fees will therefore not be awarded.

6 4. Gena Sluga: \$1,453.00

7 Sky High argues that Sluga had very little to do with the case
8 so these fees should be denied. Companion argues that these fees
9 were for attorneys who consulted with Sluga as a witness, and in
10 fact Sky High called her as a witness in its case in chief.

11 Sluga was a potential and eventual witness in this case.
12 Counsel's time spent conferring with Sluga was therefore reasonable
13 and justified.

14 5. Attorney travel costs for trial

15 Companion's travel costs for trial were included in its bill
16 of costs but not considered by the clerk of court. The court
17 likewise declines to award these costs as part of the attorney's
18 fee award because travel costs are not attorney's fees, nor are
19 they taxable costs in federal court. Companion has cited Nev. Rev.
20 Stat. § 18.005, which allows any "reasonable and necessary
21 expenses," to argue that these expenses should be taxed. However,
22 even assuming that statute could apply to the attorney fee award in
23 this case, the statute pertains to costs, not attorney's fees, and
24 does not establish that travel expenses may be awarded as fees.

25 6. Comparative negligence

26 Sky High argues that Companion's attorney's fees and costs
27 should be reduced by forty percent to reflect Companion's
28 comparative negligence. The court agrees. In light of the court's

1 evaluation of the other *Beattie* factors, which do not weigh
2 conclusively in favor of an attorney's fee award, an award of fees
3 is reasonable and justified only to the extent that Companion was
4 not culpable in this matter. The total fee award should therefore
5 be reduced by Companion's share of negligence as found by the jury.
6 Accordingly, the court will reduce both the attorney's fees award
7 and the costs taxed by forty percent. The total fee award of
8 \$182,563.63 is thus reduced to \$109,538.18. The costs taxed by the
9 clerk of the court are reduced from \$57,047.00 to \$34,228.20.

10 **II. Prejudgment Interest on Costs**

11 State law generally controls the award of prejudgment interest
12 in a diversity case such as this. *Oak Harbor Freight Lines, Inc.*
13 *v. Sears Roebuck, & Co.*, 513 F.3d 949, 961 (9th Cir. 2008).
14 Nevada's prejudgment interest statute, Nev. Rev. Stat. § 17.130,
15 includes prejudgment interest on costs from the time they were
16 incurred until entry of judgment. *Gibellini v. Klindt*, 885 P.2d
17 540, 545 (Nev. 1994). The party seeking costs must prove when they
18 were incurred. *Id.*

19 Companion provides a summary of the costs, when they were
20 incurred, and the interest on those costs at the statutory rate of
21 5.25% from the date incurred until entry of judgment (Mot. Att.
22 Fees Ex. 7). The \$5,981.54 in prejudgment interest this document
23 seeks, however, must be adjusted to omit those costs that were not
24 allowed by the clerk. After making the necessary adjustments, the
25 court concludes that Companion is entitled to prejudgment interest
26 on its costs in the amount of \$5,698.58.

27 **III. Postjudgment Interest**

28 Federal law controls the award of postjudgment interest even in

1 a diversity case. *Northrop Corp. v. Triad Int'l Mktg., S.A.*, 842
2 F.2d 1154, 1155 (9th Cir. 1988). Federal law provides for
3 postjudgment interest on any money judgment in a civil case. 28
4 U.S.C. § 1961(a). Sky High has not objected to an award of
5 postjudgment interest. Accordingly, the motion for postjudgment
6 interest will therefore be **GRANTED**.

7 **Conclusion**

8 In accordance with the foregoing, Companion's motion for
9 attorney's fees, prejudgment interest on costs, and postjudgment
10 interest is **GRANTED** subject to the deductions set forth above. The
11 judgment will be amended to reflect an award of attorney's fees in
12 the amount of \$109,538.18, costs in the amount of \$34,228.20,
13 prejudgment interest on those costs in the amount of \$5,698.58, and
14 postjudgment interest at the legal rate.

15 IT IS SO ORDERED.

16 DATED: This 5th day of February, 2016.

17 
18 UNITED STATES DISTRICT JUDGE